Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–85–93
EUSOFF CHIN CJ (MALAYA), PEH SWEE CHIN SCJ AND ZAKARIA YATIM J
13 JULY 1994

***Contract** — Option to purchase — Anticipatory breach — Impossibility of performance — Whether grantor discharged from liability — Refusal of grantee to accept repudiation — Grantee also guilty of anticipatory breach by failing to exercise option within stipulated time — Whether specific performance should be granted — Whether option was unilateral contract*

The respondent ('the vendor') had granted the appellant ('the purchaser') an option to buy a piece of land ('the land') for RM35m, upon payment by the purchaser of RM100,000 with a one month extension of the option period upon payment of a further RM50,000. Both sums of RM100,000 and RM50,000 were paid and the option period was extended to 27 November 1989. However, unknown to both parties, on 15 November 1989, two caveats were lodged against the land by third parties. This made it impossible for the vendor to fulfil its obligation under the option to deliver to the purchaser a valid memorandum of transfer of the land free from encumbrances by 30 December 1989. The vendor suggested certain amendments to the option agreement which were not acceptable to the purchaser. The purchaser refused to accept the vendor's repudiation and sued, inter alia, for specific performance and/or damages. The vendor pleaded the two caveats, denying any breach or repudiation on its part and alleged that the purchaser had failed to exercise the option by 27 November 1989. The two caveats were subsequently removed before the appeal.

The trial judge dismissed the plaintiff's claim on the grounds, inter alia, that: (i) the vendor was not in breach of the agreement as the lodging of the two caveats was not the act of the vendor; (ii) the vendor's inability to perform its obligations did not amount to a repudiation; (iii) the purchaser had not exercised the option by 27 November 1989; and (iv) as the option agreement was a unilateral contract, the vendor was not obliged to do anything until the option was exercised. The purchaser has appealed.

Held, allowing the appeal:

(1) If a party makes an unqualified or absolute promise, he accepts the risk of the performance of that promise becoming impossible. He will not be discharged from liability if performance becomes impossible through no fault of his own. Therefore, the purchaser was entitled to refuse to accept the repudiation and treat the option as still subsisting.

(2) The trial judge was incorrect in his opinion that the option agreement was a unilateral contract for a unilateral contract only binds one side legally. Here, the vendor was bound to sell the land to the purchaser, who in turn was bound to exercise the option by 27 October or 27 November 1989.

(3) The conduct and circumstances of the vendor amounted to a repudiation of the option agreement. Since the time for performance on 30 December 1989 had not arrived, the breach of contract on the part of the vendor was an anticipatory breach.

(4) The purchaser itself, by not complying with the option agreement with respect to delivery of the relevant documents and payment, had also commited an anticipatory breach of the option agreement. However, the vendor had never made known its intention to accept such anticipatory repudiation and the option agreement continued its existence.

(5) The court ordered specific performance of the option agreement and a refund of the sum of RM150,000 paid by the purchaser to the vendor. No damages were awarded for the anticipatory repudiations by both the vendor and purchaser.

[Bahasa Malaysia summary

Responden ('penjual itu') telah memberi perayu ('pembeli itu') suatu opsyen untuk membeli sebidang tanah ('tanah itu') pada harga RM35 juta, atas bayaran RM100,000 oleh pembeli itu dengan perlanjutan tempoh opsyen selama satu bulan atas bayaran tambahan RM50,000. Kedua-dua jumlah RM100,000 dan RM50,000 telah dibayar dan tempoh opsyen itu telah dilanjutkan ke 27 November 1989. Bagaimanapun, tanpa pengetahuan kedua-dua pihak, pada 15 November 1989, dua kaveat telah dimasukkan ke atas tanah itu oleh pihak ketiga. Ini telah menjadikannya mustahil bagi penjual itu untuk menunaikan obligasinya di bawah opsyen itu untuk menghantar-serahkan kepada pembeli suatu memorandum pindahmilik tanah itu yang sah dan bebas daripada sebarang bebanan sebelum 30 Disember 1989. Penjual itu telah mencadangkan beberapa pindaan kepada perjanjian opsyen itu yang tidak diterima oleh pembeli itu. Pembeli itu enggan menerima penolakan penjual itu dan mendakwa untuk, antara lain, pelaksanaan spesifik dan/atau ganti rugi. Penjual itu telah membuat pli berkenaan dengan dua kaveat itu, menafikan sebarang kemungkiran atau penolakan olehnya dan mengatakan bahawa pembeli telah gagal menggunakan opsyennya sebelum 27 November 1989. Dua kaveat itu kemudiannya telah dibatalkan sebelum rayuan ini.

Hakim perbicaraan telah menolak tuntutan plaintif atas dasar, antara lain, bahawa: (i) penjual itu tidak memungkiri perjanjian itu kerana pemasukan dua kaveat itu bukan perbuatan penjual itu; (ii) ketidakbolehan penjual itu untuk menjalankan obligasinya tidak merupakan suatu penolakan; (iii) pembeli itu tidak menggunakan

opsyen itu sebelum 27 November 1989; dan (iv) oleh kerana opsyen itu merupakan suatu kontrak satu pihak, penjual itu tidak diwajibkan untuk melakukan apa-apa sehingga opsyen itu digunakan. Pembeli itu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Jika sesebuah pihak membuat suatu janji yang tidak bersyarat atau mutlak, beliau menerima risiko bahawa janji itu mungkin tidak dapat dilaksanakan. Beliau tidak akan dilepaskan daripada liabiliti jika pelaksanaannya menjadi mustahil walaupun bukan kerana kesalahannya sendiri. Oleh itu, penjual itu mempunyai hak supaya tidak menerima penolakan itu dan menyifatkan opsyen itu sebagai masih berterusan.

(2) Hakim perbicaraan tidak betul dalam pendapatnya bahawa perjanjian opsyen itu merupakan suatu kontrak satu pihak kerana sesuatu kontrak satu pihak hanya mengikat satu pihak di sisi undang-undang. Di sini, penjual itu terikat untuk menjual tanah itu kepada pembeli itu, yang juga terikat untuk menggunakan opsyen itu sebelum 27 Oktober atau 27 November 1989.

(3) Kelakuan dan keadaan penjual itu terjumlah kepada suatu penolakan perjanjian opsyen itu. Oleh kerana masa untuk pelaksanaan pada 30 Disember 1989 belum tiba lagi, kemungkiran kontrak oleh pihak penjual itu merupakan suatu kemungkiran kontrak dalam jangkaan.

(4) Pembeli sendiri, dengan tidak mematuhi perjanjian opsyen itu berkenaan dengan penghantar-serahan dokumen dan bayaran yang berkenaan, juga telah memungkiri perjanjian opsyen itu dalam jangkaan. Bagaimanapun, penjual itu tidak memaklumkan niatnya untuk menerima penolakan dalam jangkaan itu dan perjanjian opsyen itu terus wujud.

(5) Mahkamah telah memerintahkan pelaksanaan spesifik perjanjian opsyen itu dan supaya jumlah RM150,000 yang telah dibayar oleh pembeli itu kepada penjual itu dibayar balik. Ganti rugi untuk kemungkiran dalam jangkaan oleh kedua-dua penjual dan pembeli tidak diawardkan.]

Notes

For a case on anticipatory breach, see [1990] Mallal's Digest 154.

Cases referred to

Fercometal Sarl v Mediterranean Shipping Co [1989] AC 788; [1988] 2 All ER 742; [1988] 3 WLR 200 (folld)

Howard v Pickford Tool Co [1951] 1 KB 417 (folld)

Martin v Stout [1925] AC 359 (refd)

Paradine v Jane [1558–1774] All ER Rep 172; (1647) Aleyn 26 (folld)

A *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401; [1957] 2 All ER 70; [1957] 2 WLR 713 (folld)

Appeal from: Civil Suit No S6–22–172–1990 (High Court, Kuala Lumpur)

B

KS Narayanan (*HW Wong* with him) (*TH Su & Co*) for the appellant.
DP Naban (*Lee Hishamuddin Loong*) for the respondent.

Cur Adv Vult

C **Peh Swee Chin SCJ** (delivering the judgment of the court): The appellant/plaintiff (hereafter 'the purchaser'), and the respondent/defendant, (hereafter 'the vendor'), entered into some option agreement with a view to the sale and purchase of a piece of land (hereafter 'the said land') for RM35m. The option agreement comprising a document called 'Option' D by a heading therein with a sale and purchase agreement annexed thereto, was signed by the vendor, and addressed to the purchaser. The option agreement is set out below:

Development and Commercial Bank Bhd
Wisma On-Tai Tower Block
E 161B Jalan Ampang
PO Box 10145
50450 Kuala Lumpur

Finmark Consultants Pte Ltd
No 20, Kramat Lane
F 02–01, United House
Singapore 0922

Re: Option

(1) Whereas we, Development & Commercial Bank Bhd, a company incorporated in Malaysia and having our registered office at 7th floor, Wisma On-Tai, 161B Jalan Ampang, 50450 Kuala Lumpur (hereinafter G referred to as 'the grantor') are the registered proprietor of all that piece of land known and described as Lot 413 held under State Lease 2875 in the Mukim of Tebrau, District of Johor Bahru ('the said land').

(2) In consideration of you delivering to us a bank guarantee in such form as may be acceptable to us ('the bank guarantee') guaranteeing payment H to us of Malaysian Ringgit one hundred thousand (RM100,000), we, the grantor hereby *grant* you ('the option holder') an *option* ('the option') during the option period as hereafter defined, to purchase or cause the purchase of the said land in your name or in the name of other or others as may be nominated by you, upon the terms and conditions set out in the draft sale and purchase agreement attached hereto ('the sale and purchase agreement') at the price of Malaysian I Ringgit thirty five million (RM35m).

(3) The option period shall be for a period of sixty (60) days commencing from date hereof and expiring at 5pm on 27 October 1989.

(4) Notwithstanding cl 3 above, it is agreed that if the option holder shall deliver to us seven (7) days before expiry of the option period another bank guarantee in such form as may be acceptable to us ('the second bank guarantee') guaranteeing payment to us of another sum of Malaysian Ringgit fifty thousand (RM50,000) only, we shall extend the option period for another period of thirty (30) days commencing from the date of expiry of the option period ('the extended option period') which extended option period shall expire at 5pm on 27 November 1989.

(5) The option may be exercised by the option holder before the expiry of the option period or the extended option period (as the case may be) by:

(a) the option holder delivering or causing the delivery to the grantor's solicitors, Messrs Adnan Sundra & Low, Advocates and Solicitors of 2nd Floor, Wisma Budiman, Persiaran Raja Chulan, Off Jalan Raja Chulan, 50200 Kuala Lumpur four (4) copies of the sale and purchase agreement duly executed by the purchaser(s) of the said land in the manner hereinafter described:

(i) if the purchaser(s) of the said land is/are individuals, the execution of the sale and purchase agreement shall be effected before an advocate and solicitor and duly witnessed by such an advocate and solicitor; or

(ii) if the purchaser of the said land is a company or corporate body, the sale and purchase agreement shall be executed under seal of the company or corporate body and the option holder shall at the same time of delivering the executed sale and purchase agreement, deliver to the grantor's solicitors the resolution of the board of directors of the company or corporate body duly authorizing the purchase of the said land upon the terms and conditions of the sale and purchase agreement and the affixing of the common seal thereon together with the memorandum and articles of association and/or any other documents evidencing incorporation of the company or corporate body;

(b) the option holder paying or causing the purchaser(s) of the said land to pay to the grantor a sum of Malaysian Ringgit three million five Hundred thousand (RM3,500,000) being ten per cent (10%) of the sale price of Malaysian Ringgit thirty five million (RM35,000,000) in cash or by way of banker's draft, simultaneously with the delivery of the sale and purchase agreement.

(6) Time shall be of the essence of the contract for the purpose of the option.

(7) If the option shall not duly exercised in the manner aforesaid, the option shall lapse or shall cease to have any further force or effect.

(8) It is hereby expressly agreed between the parties hereto that the grantor shall only demand payment of the aforesaid sums of Malaysian Ringgit one hundred thousand (RM100,000) and/or Malaysian Ringgit fifty thousand (RM50,000) payable under the aforesaid bank guarantees if the option is not exercised in the manner aforesaid on or before the expiry of this option. The grantor covenants and agrees with the option holder that if the option is exercised in the manner agreed herein, the

grantor shall not demand payment under both of the aforesaid bank guarantees, and shall return the said bank guarantees to the option holder for cancellation immediately upon exercise of the option in the manner aforesaid.

Dated 29 August 1989
—Sgd—
Signed by Khoo Eng Choo)
as attorney for and on)
behalf of Development &)
Commercial Bank Bhd)
in the presence of:)

Sale and Purchase Agreement

An agreement made the ___ day of _____ 19__ between Development & Commercial Bank Bhd, a company incorporated in Malaysia and having its registered office at 7th floor, Wisma On-Tai, 161B, Jalan Ampang, 50450 Kuala Lumpur (hereinafter called 'the vendor') of the one part and Finmark Consultants Pte Ltd, a company incorporated in Singapore and having its office at No 20, Kramat Lane, 02–01, United House, Singapore 0992 (hereinafter called 'the purchaser') of the other part.

Whereas

(1) The vendor is the registered proprietor of all that piece of property more particularly described as Lot 413 held under State Lease 2875 in the Mukim of Tebrau, District of Johor Bahru, Johor measuring approximately 279 acres 1 rood 28 poles (of which 90 acres have been surrendered to the Government and 29 acres 35 poles have been acquired by the Government) granted for a lease of 99 years which shall expire on 23 May 2064 (hereinafter called 'the said property'). A true copy of the title to the said property is attached hereto as 'Annexure A'.

(2) The vendor has agreed to sell and the purchaser has agreed to purchase the said property upon the terms and conditions hereinafter contained.

Now it is hereby agreed as follows:

(1) The vendor shall sell and the purchaser shall purchase the said property free from all liens, charges, mortgages and other encumbrances and charges, but *subject* nevertheless to all conditions of title whether express or implied affecting the same *and* to the terms and conditions hereinafter contained for the total consideration of Ringgit thirty-five million (RM35,000,000) only (hereinafter called 'the purchase price').

(2) The purchaser shall pay the vendor the purchase price in the following manner:

(a) a sum of Ringgit three million and five hundred thousand (RM3,500,000) only ('the deposit') to be paid immediately upon execution hereof; and

(b) subject to clauses below the balance purchase price of Ringgit thirty-one million and five hundred thousand (RM31,500,000) only ('the

balance purchase price') to be paid on or before 30 December 1989 (hereinafter called 'the completion date'). A

(3) (a) This sale is subject to the approval of the Foreign Investment Committee ('FIC') being obtained by the purchaser at least seven (7) days before the completion date (hereinafter referred to as 'the approval date-line' [sic]);

(b) Within seven (7) days from the date hereof, the purchaser shall submit its application for the purchase of the said property to the FIC for its approval ('the FIC's approval'). If the purchaser shall fail to do so, the vendor shall be at liberty to treat this agreement as having been rescinded by the purchaser and this agreement terminated in the manner described in cl 4 below. B

(c) The vendor shall give the purchaser all such information as the purchaser may require for the said application. C

(d) As soon as FIC's approval is issued (whether on conditions or otherwise), this Agreement shall become unconditional and the sale herein shall be completed in the manner herein provided.

(4) (a) If the purchaser (through no fault, action, default of omission on his part) shall fail to obtain the FIC's approval on or before the approval date-line [sic] the vendor shall then refund to the purchaser the deposit with interest in the manner described in cl 5(b) below and thereafter this agreement shall become null and void and be of no effect and neither party hereto shall be entitled to claim any damages, compensation, costs or otherwise from the other. D

(b) For the purpose of cl 4(a) above, the vendor agrees that the first rejection (if any) by the FIC of the application of the purchaser for the FIC's approval issued before expiry of the approval date-line [sic], shall not be deemed to be failure on the part of the purchaser to obtain the FIC's approval if the purchaser shall forthwith submit its appeal to the FIC for a review of its decision. *Provided always that* if the FIC shall fail to render its decision or reject such appeal by the approval date-line [sic], the purchaser shall be deemed to have failed to obtain FIC's approval pursuant to cl 3 above and the provision of cl 4(a) shall apply. E F

(5) (a) Immediately upon receipt of the deposit, the vendor shall place the deposit in a monthly fixed deposit account ('the fixed deposit account') to be opened by the vendor with a licensed commercial bank as may be selected by the vendor (which shall include the vendor itself) and the fixed deposit account shall be automatically renewed until the deposit is withdrawn by the vendor on determination or completion of the transaction herein contemplated. G

(b) In the event the vendor is required to refund the deposit together with interest to the purchaser pursuant to the terms hereof, the purchaser acknowledges and agrees that it would have been fully paid and satisfied by: H

(i) the vendor withdrawing the deposit and all interest payable thereunder from the fixed deposit account on a date nominated by the purchaser; and I

(ii) the vendor paying the purchaser all sums withdrawn from the fixed deposit account.

(6)(a) *Provided that* the purchaser shall have made full payment of the purchase price and all other moneys as are due hereunder and has observed and performed all the covenants stipulations and conditions herein set out as are on its part to be observed and performed, the vendor shall on the completion date at the office of its solicitors, Messrs Adnan Sundra & Low, Advocates and Solicitors of 2nd Floor, Wisma Budiman, Persiaran Raja Chulan, Off Jalan Raja Chulan, 50200 Kuala Lumpur (hereinafter called 'the vendor's solicitors') deliver all the following documents described in cl 6(b) below to any one of the following persons at the election of the purchaser:

(a) the purchaser; or

(b) the authorized solicitors of the purchaser; or

(c) if the purchaser shall take a loan to purchase the said land, the financiers (or the solicitors of the financiers) granting the loan to the purchaser.

(b) The documents above referred to in cl 6(a) are:

(i) a valid and unstamped registrable memorandum of transfer of the said property duly executed by the vendor in favour of the purchaser or its nominee or nominees;

(ii) the issue document of title to the said property free from all encumbrances whatsoever;

(iii) all other documents as are necessary to effect registration of the said property into the name of the purchaser or its nominee or nominees free of all liens, charges, mortgages or other encumbrances; and

(iv) the current quit rent receipts.

(c) Upon receipt of the documents above described in cl 6(b), the purchaser shall transfer or cause the transfer of the said property into its name or that of its nominee or nominees as soon as possible.

(7)(a) If for any reasons other than that stated in cl 4 above, the purchaser shall fail to pay any or any part of the moneys due on the completion date, the vendor shall be entitled to:

(i) seek specific performance of the contract and for the purpose thereof, the parties hereto expressly agree that the alternative remedy of monetary compensation shall not be regarded as compensation or sufficient compensation for any party's default in the performance of the terms and conditions herein; or

(ii) treat this agreement as having been repudiated by the purchaser and upon the vendor issuing notice thereof to the purchaser, this agreement shall be null and void and of no effect whatsoever.

(b) In the event of cl 7(a)(ii) above:

(i) the vendor shall be entitled to deal with or otherwise dispose of the said property in such manner as the vendor shall see fit as if this agreement had not been entered into;

(ii) the deposit together with all interest accrued thereunder shall irrecoverably be forfeited to the vendor and shall be retained by and thenceforth belong to the vendor and shall not be refunded to the purchaser in any circumstances;

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise.

(8) In the event of the purchaser performing and observing all terms covenants and conditions on its part herein contained and the vendor shall refuse to complete the sale on the completion date, the purchaser shall at its option be entitled either:

(a) to seek specific performance of the contract and for the purpose thereof, the parties hereto expressly agree that the alternative remedy of monetary compensation shall not be regarded as compensation or sufficient compensation for any party's default in the performance of the terms and conditions herein; or

(b) to a refund of the deposit in the manner described in cl 5(b) above and upon payment thereof, this Agreement shall be null and void and of no effect whatsoever and neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise.

...

(16) The vendor hereby represents and warrants to the purchaser as follows:

(a) The vendor has good, marketable, absolute and indefeasible title to the said property and can pass such title to the purchaser subject to the terms and conditions hereof; and

(b) pending completion of the sale herein and registration of the transfer of the said property in favour of the purchaser, the vendor shall not sell, transfer, charge or otherwise howsoever deal with the said property or any part thereof or any interest therein or make the same subject to any burden, charge, encumbrance, liability or lien whatsoever or make any application for the alteration of the category of land use or for the imposition of any fresh category of land use in respect of the said property or for the rescission, removal or amendment of any conditions or restriction affecting the said property or lease or let out or grant any licence or otherwise howsoever part with the possession of the said property or any part thereof without the written consent of the purchaser first had and obtained.

...

(22) Time shall be of the essence of the contract in relation to all the provisions of this agreement.

...

In witness whereof the vendor and the purchaser have hereunto set their respective hand and seal the day and year hereunder written.

Signed by _____)
as the duly authorized attorney)
of the vendor, Development &)
Commercial Bank Bhd, on the ___)
day of _____ 1989 in the)
presence of:)

The common seal of the purchaser,)
Finmark Consultants Pte Ltd, was)
hereunto affixed on the ___ day of)
_____ 1989 in the presence of:)

A The option agreement together with the annexed sale and purchase agreement will be hereafter called collectively the said option agreement, but when any particular clause is hereafter mentioned, it shall be referred to as any clause of the said option agreement or any clause of the said sale and purchase agreement, as the case may be.

B At the outset, it is desirable to make it clear that two cash payments from the purchaser to the vendor for the sums of RM100,000 and RM50,000, respectively, have substituted for the two bank guarantees for the same sums as described in cll (2) and (4) of the said option agreement, respectively. No issue turns on this in this appeal before us.

C Both the sums of RM100,000 and RM50,000 in pursuance of the said cll (2) and (4) were paid with the result that the period for the purchaser to buy the said land was extended to 5pm on 27 November 1989. By cl 6 of the same, time was made the essence of the contract.

Unknown to both parties, on 15 November 1989, two caveats were lodged against the said land by some separate third parties. The said two D caveats which sparked off the legal battle between the parties before us have since been removed subsequently before the hearing of the present appeal before us. This removal will of course assist us in the exercise of our discretion as to whether to grant specific performance or not.

Very briefly, the purchaser sued, praying for specific performance of E the agreement to sell the said land to it, an injunction to restrain the vendor from selling the said land to others, damages for breach of contract in lieu of, or in addition to specific performance.

The vendor pleaded the said two caveats, denying any breach or repudiation of contract on its part and pleaded further that the purchaser F had failed to exercise the option to purchase by 27 November 1989.

The facts and circumstances of this case are crucial.

Having regard to the option agreement set out above, the last day for the purchaser to deliver up all the documents and pay RM3.5m (being 10% of the purchase price), to the vendor at the vendor's solicitors' office G in pursuance of cl 5 of the option agreement was 27 November 1989. As the date was approaching, the purchaser began a flurry of activities. Mr Su (PW1), the purchaser's solicitor, 'faxed' a letter dated 23 November 1989, on the same day as the date of the letter requesting for an appointment or meeting with the vendor's solicitors for delivery to the said solicitors the documents and making the payment.

H According to Mr Su, no response (confirmation) to his request for an appointment at 4pm on 24 November 1989 at the vendor's solicitors' office was received and this was followed by a number of telephone calls to them for their Mr Sundra or Ms Ng, members of the said vendor's solicitors' firm. On 24 November 1989, he wrote for confirmation of the I requested appointment, enclosing 'a copy of the Deutsche Bank's cheque for RM3.5m', as an appetizer, perhaps.

A meeting of Mr Su with the said Ms Ng at 12 noon on 25 November 1989 was finally had.

The purpose of Mr Su's visit was of course, to hand over the documents and to pay RM3.5m to Ms Ng, representing the vendor. Armed with a covering letter dated 25 November 1989, all documents as required by cl 5 of the said option agreement and a bank draft or bank's own cheque for RM3.5m from Deutsche Bank, Kuala Lumpur in favour of the vendor's name, Mr Su with Joseph Lai and three other persons came to the office of Ms Ng. The letter dated 25 November 1989 is set out below:

> TH Su & Co
> Advocates and solicitors
> 16th Floor, UMBC Tower Annexe
> Jalan Sultan Sulaiman
> 50000 Kuala Lumpur
>
> 25 November 1989
>
> Messrs Adnan Sundra & Low
> Advocates and solicitors
> 2nd Floor, Wisma Budiman
> Persiaran Raja Chulan
> Off Jalan Raja Chulan
> 50200 Kuala Lumpur
>
> Dear Sirs
>
> Re: Option dated 29 August 1989, State Lease 2875, Lot 413, Mukim of Tebrau, District of Johor Bahru
>
> I act for Finmark Consultants Pte Ltd of No 20, Kramat Lane, 02–01, United House, Singapore 0922.
>
> I refer to the option dated 29 August 1989 ('the Option') in respect of the above land ('the land') granted by your clients, Development & Commercial Bank Bhd ('D & C Bank') to my client.
>
> Pursuant to the option my client hereby exercises the option and nominates Palm Crescent Sdn Bhd to purchase the land. Accordingly, please find enclosed:
>
> (a) four copies of the sale and purchase agreement duly executed by Palm Crescent Sdn Bhd ('the purchaser') which were already previously initialled by your clients. The name of Finmark Consultants Pte Ltd has been deleted and the name of Palm Crescent Sdn Bhd inserted onto the front cover, the first page and the last page of the sale and purchase agreement;
>
> (b) the resolution of the board of directors of Palm Crescent Sdn Bhd authorizing the purchase of the land and the affixing of the common seal of Palm Crescent Sdn Bhd onto the above sale and purchase agreement;
>
> (c) a copy of the memorandum and articles of association of Palm Crescent Sdn Bhd;
>
> (d) a copy of the certificate of incorporation of Palm Crescent Sdn Bhd; and

A (e) a bank draft for RM3,500,000 dated 24 November 1989 issued by Deutsche Bank (Asia) in Kuala Lumpur in favour of D & C Bank.

As the option has been duly exercised please request your client to return the sum of RM150,000 to my client as soon as possible. I have my client's instructions to request your client to make out the cheque of RM150,000 in favour of my firm.

B Pursuant to the commission letter dated 29 August 1989 please request your client to pay my client the sum of RM700,000 in due course. I have my client's instructions to request that the cheque of RM700,000 be made out in favour of my firm.

On 16 November 1989 Kassim Chan Management Consultants Sdn C Bhd filed the application for FIC approval on behalf of Palm Crescent Sdn Bhd. A copy of the said letter of 16 November 1989 is enclosed for your attention.

I have had two meetings with FIC on the matter with Mr Brian Aw of D & C Bank. I am informed by Mr Affendi of FIC that he will try to table the application on 1 December 1989 and if so, an answer is expected on D 4 December 1989.

Mr Joseph KS Lai of Messrs Allen & Gledhill is representing Palm Crescent Sdn Bhd in the purchase of the land.

Please acknowledge receipt of this letter and all the documents aforesaid by signifying the same on the duplicate of this letter.

E Thank you.

Yours faithfully
for TH Su & Co
—Sgd—
TH Su

F cc clients
Allen & Gledhill
(Mr Joseph KS Lai)

Then at the meeting room of the vendor's solicitors, the said Ms Ng came to meet them. Ms Ng denied there was a prior appointment made to meet Mr Su and his delegation. While Mr Su was taking out all the documents G in pursuance of cl 6 of the option agreement; Ms Ng produced her letter of the same date of 25 November 1989 for Mr Su and the letter is set out below:

Adnan Sundra & Low
Advocates and solicitors
H 2nd Floor, Wisma Budiman
Persiaran Raja Chulan
Off Jalan Raja Chulan
50200 Kuala Lumpur

25 November 1989

I Messrs TH Su & Co
Advocates and solicitors
16th Floor, UMBC Tower Annexe
Jalan Sultan Sulaiman
50000 Kuala Lumpur

Attention: Mr Su Thiam Hock

Dear Sirs

Re: Option dated 29 August 1989 in respect of land held under State Lease 2875, Lot 413, Mukim of Tebrau Johor Bahru ('the option') .

We refer to your letter of 23 November 1989 whereby you advised us that your client intends to exercise the option on 24 November 1989.

However prior to your client's exercising the option, we have been instructed by our client to inform you that two (2) caveats have been lodged on the above piece of land, one by Tan Sri Abdul Aziz and the other by Kota Tanah Realty Sdn Bhd, both lodged on 15 November 1989.

Our client shall take all necessary steps to remove the aforesaid two (2) caveats. However in the meantime, we wish to draw to your attention that there is a possibility that completion of the sale may be delayed pending the necessary action to remove the said two (2) caveats. Our client cannot perform what is beyond their ability in that if the caveats are still subsisting (despite all action taken by our client to remove same) our client would not be able to transfer the land in favour of your client.

In view of the circumstances, please let us know whether your client still intends to exercise the option. If your client still desires to exercise the option, the sale and purchase agreement should be amended to duly reflect the revised circumstances.

Yours faithfully
—Sgd—
cc Development & Commercial Bank Bhd
(Attention: Mr Brian Aw)

After reading the letter from Ms Ng (DW2), Mr Su became very angry, both Mr Su's party and Ms Ng discussed some remedial steps, nonetheless without reaching any consensus. They all agreed to meet again on 27 November 1989 at 11am at the same place.

On 27 November 1989, Mr Su went to see Ms Ng with the same delegation, this time with the addition of two other persons. There, Ms Ng produced some draft containing a proposed amendment to the sale and purchase agreement to cater for the situation created by the said two caveats in question, involving changes to the sale and purchase agreement by adding a new para 2 of the recital, and new cll 1, 2 and 3. Mr Su informed Ms Ng that the amendment was unacceptable and offered a counter proposal which Ms Ng said she would not consider. Therefore, Mr Su wrote another letter dated 27 November 1989, referring in particular, to the indefinite period for the delivery of the registrable transfer by the vendor to the purchaser, and said he could only conclude that the vendor had repudiated the option agreement. Mr Su wrote however that his client did not accept such repudiation and regarded the option agreement as still in force.

Ms Ng wrote back to deny such repudiation alleged by the vendor, for she was merely giving notice to the purchaser of the circumstances (about the said two caveats in question). She further wrote: 'Any

A amendments to the sale and purchase agreement were not instigated by our client but was a response to your client's request for amendments'.

Further ineffective discussion took place, then the writ, then the hearing at the High Court and now the appeal before us.

The claims of the purchaser were dismissed by the learned trial B judge. The issue framed by the learned trial judge was as to whether the option agreement in question was repudiated by the vendor's letter dated 25 November 1989 handed to Mr Su at the meeting room of the vendor's solicitors when Mr Su was taking out and going to deliver the requisite documents and to make payment to Ms Ng.

C On this issue, the learned trial judge stated he was unable to follow the argument of the purchaser that the vendor was in breach because the vendor could not be blamed for the lodging of the said two caveats as such lodging was not the act of the defendant. Consequently about the letter dated 25 November 1989 from Ms Ng to Mr Su suggesting, inter alia, that amendments had to be made to the said agreement of sale and purchase D and to the effect that the vendor could not perform because of the said two caveats, it did not amount to a repudiation of the said option agreement.

The learned trial judge held also that the vendor was not in breach of the said option agreement and that the action of the purchaser was dismissed for the following reasons:

E (1) The lodging of the said two caveats was not the act of the vendor who could not be blamed.

(2) The purchaser had by its letter dated 27 November 1989 made its stand clear that it did not accept any repudiation and that it regarded the option agreement as still subsisting.

F (3) The purchaser must exercise the option to buy and had not done so by 27 November 1989.

(4) The option agreement was a unilateral contract, and the defendant was not obliged to do anything until the option was exercised.

G (5) The removal of the said two caveats would not be difficult and it was premature for the purchaser to say that the vendor was in breach.

We deal first with the reasons of the learned trial judge before we give our conclusions, though the two frequently overlap.

Although the lodging of the said two caveats by third parties was not H the act of the vendor, the completion date was 30 December 1989. The performance by the vendor of delivery of the memorandum of transfer, issue of document of title for registration in favour of the purchaser free from all encumbrances by 30 December 1989, became impossible because of the said two caveats, from all accounts, and hence the necessity of amendment to the agreement of sale and purchase to take account of the I removal of these two caveats requiring more time beyond 30 December 1989. Please see cll 2(b) and 6 of the sale and purchase agreement annexed to the said option agreement. Could the vendor be blamed for such expected impossibility?

To find out, one must look for any express provision in the option agreement and the sale and purchase agreement annexed to it which may govern such a position. There is none. Further there is also no force majeure clause to excuse performance by the vendor on account of any extraneous event obstructing the performance with the vendor having no control at all over such event and through no fault of the vendor.

If a party makes an unqualified or absolute promise, he accepts the risk of the performance of that promise becoming impossible. He will not be discharged from liability if performance becomes impossible through no fault of his own. To illustrate, take the old case of *Paradine v Jane* [1558–1774] All ER Rep 172; (1647) Aleyn 26 in which a lessee was held to be still liable to pay rent even if he was driven out of the demised premises during the civil war.

Both parties have wisely not resorted to the doctrine of frustration of contracts. There is no need for us to comment on it further.

About the purchaser writing on 27 November 1989 to inform the vendor of its not accepting the repudiation by the vendor and treating the option agreement as still subsisting, it was a stand which the innocent purchaser was perfectly entitled then to take, if the learned trial judge meant that the purchaser could not do so.

About the learned trial judge's opinion that the said option agreement was a unilateral contract, we are unable to agree with the learned trial judge for a unilateral contract binds one side only legally, such as a person offering a certain reward for any finder of a lost dog. Here, the option agreement would bind both sides. Looking at the said option agreement, in particular, its cl 8, the vendor is bound to sell the said land to the purchaser. The purchaser is bound to 'exercise the option' to buy the said land by 27 October 1989, failing which he has to pay RM100,000. If time for exercising the option to buy the said land is extended to 27 November 1989, and if the purchaser fails to exercise the option to buy the said land by that extended date, the purchaser has to pay the vendor another RM50,000 in addition. There is really no option granted to either not to buy or not to sell as the case may be.

Then again his Lordship said that the purchaser had not exercised the option. This court will take it to mean that the purchaser has failed to comply with cl 5 of the said option agreement. We will deal with it later.

On the question as to whether the vendor had repudiated the said option agreement on 25 November 1989, so much energy was directed to this question, that we feel we need to deal with it in some detail.

When Ms Ng produced her letter to Mr Su on 25 November 1989, (the terms of which have been set out earlier), Mr Su had good reason to conclude that the letter meant the vendor could not perform its contract in some essential respect, ie signing a valid and registrable transfer on 30 December 1989, and was a clear expression of the vendor's intention not to be bound by the said option agreement. Since the time for performance on 30 December 1989 had not arrived, the breach of contract on the part

A of the vendor was an anticipatory breach, see *Martin v Stout* [1925] AC 359. Still the vendor would be in breach even if it really intended to perform the said option agreement subject to an amendment to the sale and purchase agreement on terms to provide for time to remove the said two caveats, for it led Mr Su equally to believe that the vendor no longer intended to be bound by the provisions of the said option agreement, ie to
B deliver a valid and registrable transfer from all encumbrances, on or before 30 December 1989, see, eg *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at p 436; [1957] 2 All ER 70 at p 84; [1957] 2 WLR 713 at p 730.

We are of the view that the conduct and circumstances on 25 November 1989, primarily with regard to Ms Ng's letter, amounted to a
C repudiation of the said option agreement when it was still executory, for the time for performance by the vendor to deliver a valid and registrable transfer of the said land [free] from all encumbrances on or before 30 December 1989, had not arrived, and therefore there was an anticipatory repudiation of the said option agreement on the part of the vendor.

D In the face of such anticipatory repudiation, the purchaser had two choices as explained by Lord Ackner in *Fercometal Sarl v Mediterranean Shipping Co* [1989] AC 788 at p 805; [1988] 2 All ER 742 at p 751; [1988] 3 WLR 200 at p 212:

> When A wrongfully repudiates his contractual obligations in anticipation of
E the time for their performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice ...

When Mr Su wrote on 27 November 1989, he expressly stated that he
F wanted the contract to be kept alive. This Mr Su was perfectly entitled to do. He took Lord Ackner's first choice stated above. It must be remembered that the said option agreement survived and remained for the benefit of both parties.

Now both the learned trial judge and the learned counsel for the vendor said that by 27 November 1989, the purchaser 'had not exercised
G th option'. What they both meant was that the purchaser had failed on or before 27 November 1989 to deliver the requisite documents and make the requisite payment to the vendor in pursuance of cl 5 to the said option agreement. This point was well taken, though taken rather laconically.

The conduct and circumstances of the parties on 25 November 1989
H comprising principally the letter handed over by Ms Ng to Mr Su, seem to be causing somewhat (without deciding at all such causation), the purchaser to refrain from pressing on with the delivery of the said requisite documents and the payment of the said requisite sum, but this court is under no duty to decide as to whether estoppel applies. Estoppel, as a rule, should be
I pleaded. The purchaser has not pleaded it in any pleading.

The court is left with having to consider only those two choices mentioned by Lord Ackner in *Fercometal.* We did not quite finish the quotation from Lord Ackner set out above. His Lordship continued [1989]

AC 788 at p 805; [1988] 2 All ER 742 at p 751–752; [1988] 3 WLR 200 at p 212: A

> There is no third choice, as a sort of via media, to affirm the contract and yet to be absolved from tendering further performance unless and until A gives reasonable notice he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of both parties ... B

In other words, as someone said in this connection, there is no half-way house.

Therefore, legally the purchaser, by not complying with cl 5 of the said option agreement in regard to the requisite documents and the requisite payment, has itself subsequently caused as well an anticipatory breach of the said option agreement in a similar way, though not in a reprehensible way. C

However, when there is an anticipatory repudiation of an executory contract as in this option agreement, such a contract continues in existence until the innocent party makes known his intention to accept such repudiation, otherwise, to quote the well-known and oft-quoted statement, 'an unaccepted repudiation is a thing writ in water', per Asquith LJ in *Howard v Pickford Tool Co* [1951] 1 KB 417 at p 421. D

The vendor has never made known its intention to accept such anticipatory repudiation at all. The said option agreement continues its existence. E

For reasons given above and after due consideration, we are of the opinion that the lower court has erred in declining to decree specific performance.

There is another point about the total sum of RM150,000 paid by the purchaser to the vendor, which would have to be dealt with according to the terms and according to the construction of the terms of the said option agreement. Such being the case, the said sum would have to be refunded if this court decrees specific performance. F

For the wrongful anticipatory repudiation on 25 November 1989 on the part of the vendor, balanced or countered by the wrongful anticipatory repudiation on or by 27 November 1989 on the part of the purchaser, since we are also going to grant specific performance, we will order that no damages be paid by either party. G

We therefore allow the appeal, setting aside the judgment of the lower court. We further order that the said option agreement dated 29 August 1989, together with a sale and purchase agreement as annexed thereto and forming part of the said option agreement be carried into effect on the following terms and directions: H

(1) The defendant do pay the sum of RM150,000 to the plaintiff within 21 days from today without any interest up to the end of 21 days from today, and if not paid thereafter, it shall carry the usual decretal interest. I

(2) The said option agreement dated 29 August 1989 together with the said sale and purchase agreement as annexed thereto subject to the terms of this order as regards the times for doing any act or making any payment, be carried into effect mutatis mutandis.

(3) The plaintiff do deliver all the documents and make payment by a banker's order or cheque of the sum as required under cl 5 of the said option agreement within 21 days from today.

(4) The plaintiff do further pay the balance of the purchase price of the said land (such balance being the sum of RM31.5m), within a period of 33 days from the expiry of the 21 days mentioned in para (3) above of this order.

(5) The defendant do deliver to the plaintiff a valid and unstamped registrable memorandum of transfer of the said land, and the issue document of title of the said land and all other documents as stated in cl 6 of the sale and purchase agreement as annexed to the said option agreement upon the payment of the said balance of purchase price stated in para (4) above of this order.

(6) All that is required to be done under paras (3), (4) and (5) above of this order should be done at the office of present solicitors, the defendant.

(7) The whole of this order is subject to both parties carrying out all other requirements as set out in, and in accordance with the said option agreement together with the agreement of sale and purchase as annexed to it and not specifically mentioned in this order.

(8) That the parties hereto be granted liberty to apply to this court for further directions in connection with the implementation of this order by motion.

(9) That the defendant do pay costs to the plaintiff here and in the court below.

Appeal allowed.

Reported by Prof Ahmad Ibrahim